APPENDIX A

Texas Penal Code, Title 17, Art. 1723 (Vernon 1953)

ART. 1723. OFFENSES IN CONNECTION WITH BOMBS.

Definition of bomb.

Section 1. The term "bomb," as used in this Act means

(a) Any explosive, inflammable or combustible substance, controlled in any form of container whatsoever whereby the same is susceptible of being set off or exploded, or which automatically explodes when coming in contact with heat, fire, mechanical contrivance or chemical process or which will ignite, detonate or dissemble in any manner so as to cause injury or harm to any person, animal or plant life, or which will damage property in any manner.

(b) Any substance classified by scientists as being fissionable or capable of liberating subatomic or nuclear energy in quantities destructive of life and property.

(c) Any collection of nitroglycerine, dynamite, gun powder, guncotton or other form of explosive matter including caps, fuses or fuseheads capable by their ignition or explosion of causing damage to persons or property.

(d) Any container which may conceal or segregate bacteria, disease germs, poisons, poisonous gases or contagious matter of any kind that is capable of causing sickness, nausea, disability or death to any person or animal, or which may inoculate plant life, contaminate water, air or food, or damage property.

(e) Any time bomb, booby trap, land mine, dynamite stick, infernal machine or any other contrivance reasonably believed by the arresting person to be intended to be used for unlawful purposes.

(f) Any capsules, ampules, tubes, torpedoes or encased containers that may contain disease-spreading, inflammable, combustible, harmful or explosive substance of an

kind or which if commingled with other substances would cause an explosion or any condition or situation which might endanger life, health or property.

Manufacturing, owning, storing, keeping, selling, transporting, possessing or having control

Section 2. Whoever shall manufacture, own, store, keep, sell, transport, possess or have in his control a bomb, as defined in Section 1, shall be guilty of a felony and upon conviction shall be confined in the State Penitentiary for not less than five (5) years and not more than twenty-five (25) years and fined not less than One Thousand Dollars ($1,000) and not more than Ten Thousand Dollars ($10,000), either or both. If mayhem or death shall result from such act, then the death penalty may be assessed.

Possession on person or in containers deposit; possession of parts

Section 3. Whoever shall be found with a bomb on his person, or in any container carried by him or if he is shown to have just cast from him a bomb to avoid capture with it in his possession, or who is shown to have deposited the same at a place where he intended for it to be exploded or where it might have exploded and caused damage to the life, health or property of another, or who has in his possession any component part of such bomb which, if combined with any other material or contrivance, could or would be calculated to explode and damage property, life or health, shall be punished as herein set forth.

Possession, etc., for unlawful purpose or for commission of crime

Section 4. Whoever shall be found with such bomb on his person, or to have had the same in his possession or under his control, or to have had it before he deposited it or cast it from him to avoid capture with it in his possession, and

who is or was about to use the same for unlawful purpose or for the commitment of any crime such as burglary, murder, arson, mayhem, extortion, robbery or intimidation, or for the destruction of any house that he desires another person or persons to vacate or abstain from occupying, or for the purpose of forcing others to obey his will by threatening the use of said bomb, shall be guilty of violation as set forth in this Act.

Contamination of water, air or food supply

Section 5. Whoever shall contaminate the water supply, the air supply or the food supply of any person or persons, or of the public generally, by any bomb or container from which disease germs or bacteria are released or are allowed to escape for the purpose of destroying life or of injuring the health of any person, animal or plant shall be deemed guilty of violating this Act.

Attaching so as to explode on ordinary use of thing to which attached

Section 6. Whoever shall attach any bomb to any structure, window, doorway, automobile or other object or to any mechanism where, upon the ordinary use of the same, an explosion will result that does or may cause damage to health, life or property of another shall be guilty of a violation of this Act.

Possession of parts with intent to combine

Section 7. Whoever shall be shown to have brought a component part of such bomb to a certain place, or to have had same in his possession with the intent of combining it with other substance, mechanism or contrivance that will render it capable of producing an explosion, dispersion or combustion which will cause danger to life, health or property of another shall be guilty of the violation of this Act.

Aiding, abetting or conspiring

Section 8. Any person who is shown to have aided, abetted, conspired with, or caused another to possess, transport, deposit, store or control a bomb for the purpose of causing injury to any person or to his property, or who is shown to have given any direction to another as to where such bomb should be or was kept, used, planted, or employed, shall be deemed guilty of a violation of this Act as if the said instigator was actually present and had the said bomb in his custody and possession.

Exemptions

Section 9. The provisions of this Act shall not apply to duly constituted police or law enforcement officers, or to members of the military, naval or air force establishments when acting within their official capacities, or to licensed and recognized manufacturers, storers or dealers in pest destroyers, chemical substances or laboratory supplies of any kind, or to licensed physicians, surgeons, chemists, pharmacists, nurses or hospital employees in their usual employment. Nor shall it apply to railroads, commercial truckers or recognized operators or licensed dealers who transport or use dynamite or other explosives in legitimate mining, oil developing, manufacturing or displaying of fire works, or to torpedoes, fusees and other inflammable or explosive substances used by railroads as warning or signal devices, or to persons manufacturing, storing, transporting or selling ammunition where the said persons are engaged regularly in the legitimate business of dealing in such substances. Nor shall it apply to any substances or containers used or intended to be used for industrial, mechanical, laboratory or medical purposes, or for use in the arts and sciences, or for use as economic poisons, antifreeze preparations, or fuels. This Act shall exempt the following items: small arms propellant powder, and small arms primers, and percussion caps, and old fashioned black powder.

Suppression of violations; searches

Section 10. Whenever it comes to the knowledge of any sheriff or other peace officer of the State, or of any county or precinct, by affidavit of a reputable citizen or otherwise, that any provision of this Act is being violated or about to be violated, such officer shall immediately avail himself of all lawful means to suppress this violation; and he shall be authorized by any search warrant that is issued by virtue of this Act to enter any house, room or place to be searched, using such force as is necessary to accomplish said purpose.

Law cumulative; partial invalidity

Section 11. The offenses defined herein and the punishment provided are cumulative of other existing laws relating to bombs or explosives and the provisions of this Act shall not repeal any existing laws of this State so relating. Should any section or part of this Act be held invalid, it shall not affect nor invalidate any other section or part hereof. Acts 1951, 52nd Leg., p. 783, ch. 435.

APPENDIX B

No. 31,966

JAMES EVERETT McCLANE, *Appellant*

v.

THE STATE OF TEXAS, *Appellee*

Appeal from Dallas County

Opinion

Upon a plea of nolo contendere, appellant was convicted of the offense of unlawfully possessing a bomb and his punishment assessed by the jury at confinement in the penitentiary for 5 years.

The indictment drawn under Art. 1723, V.A.P.C., alleged that appellant did "unlawfully possess and have in his control a bomb, to-wit, a combustible substance, to-wit, gasoline contained and controlled within a container, then and there provided with a wick, which said bomb was then and there capable by its ignition and explosion of causing damage to persons and property, . . ."

Art. 1723, V.A.P.C., Sec. 1, 1(a), 2 and 9 read as follows:

> "Section 1. The term 'bomb', as used in this Act means: (a) Any explosive, inflammable or combustible substance controlled in any form of container whatsoever whereby the same is susceptible of being set off or exploded, or which automatically explodes when coming in contact with heat, fire, mechanical contrivance or chemical process or which will ignite, detonate or dissemble in any manner so as to cause injury or harm to any person, animal or plant life, or which will damage property in any manner."
>
> "Section 2. Whoever shall manufacture, own, store, keep, sell, transport, possess or have in his control a bomb, as defined in Section 1, shall be guilty of a felony and upon conviction shall be confined in the State Penitentiary for not less than five (5) years and not more than twenty-five (25) years and fined not less than One Thousand Dollars ($1,000) and not more than Ten Thousand Dollars ($10,000), either or both. If mayhem or death shall result for such act, then the death penalty may be assessed."
>
> "Section 9. The provisions of this Act shall not apply to duly constituted police or law enforcement officers, or to members of the military, naval or air force establishments when acting within their official capacities, or to licensed and recognized manufacturers, storers or dealers in pest destroyers, chemical substances or laboratory supplies of any kind, or to licensed physicians, surgeons, chemists, pharmacists, nurses or hospital employees in their usual employment. Nor shall it apply to railroads, commercial truckers or recognized operators or licensed dealers who transport or use dynamite or other explosives in

> legitimate mining, oil developing, manufacturing or displaying of fireworks, or to torpedoes, fuses and other inflammable or explosive substances used by railroads as warning or signal devices, or to persons manufacturing, storing, transporting or selling ammunition where the said persons are engaged regularly in the legitimate business of dealing in such substances. Nor shall it apply to any substances or containers used or intended to be used for industrial, mechanical laboratory or medical purposes, or for use in the arts and sciences, or for use as economic poisons, antifreeze preparations, or fuels. This Act shall exempt the following items: small arms propellent powder, and small arms primers, and percussion caps, and old fashioned black powder."

Appellant filed various motions to quash the indictment on the ground that the allegations contained therein were insufficient to charge an offense under Art. 1723, supra.

Appellant's first complaint is to the court's action in overruling motion to quash No. 4 wherein appellant alleged that the indictment was insufficient because it did not negative the exemptions contained in Sec. 9 of Art. 1723, supra. The rule governing when exceptions to the operation of a criminal statute must be negatived in the State's pleading is found in Baker v. State, 132 Tex. Cr. R. 527, 106 S.W. 2d 308, 311 as follows:

> "From what we have said above, and as far as we have been able to ascertain, our courts have uniformly held that when the Legislature sees fit to create exceptions to the general penal provisions of a statute, if such exceptions be placed in a separate section or article from the one containing the definition of the offense, or if they be not such as to be essential to the definition of the offense, it will not be necessary to negative such exceptions in the indictment charging such offense."

See also 1 Branch's Ann. P.C. 2d Ed. par. 536, p. 508, and cases there cited.

The exemptions separately contained in Sec. 9 of Art. 1723, supra, are clearly not a part of the definition of the offense and under the rule above quoted it was not necessary that they be negatived in the indictment.

Appellant next insists that the court erred in overruling his motions to quash the indictment because of certain variances between the allegations of the indictment and the language of the statute defining the offense. We find the allegations contained in the indictment sufficient to allege an offense under Sec. 1(a) of Art. 1723, supra. While in charging the offense, certain words not in the statute were substituted in the indictment such as "contained" for "controlled", "capable" for "susceptible", "ignition and explosion" for "set off or exploded" and "damage to person and property" for "injury or harm to any person, animal or plant, or damage property in any manner", the words substituted were equivalent to the words used in the statute. It is the rule where a word not in the statute is substituted in the indictment for one that is, the indictment is sufficient if the word substituted is equivalent to the word used in the statute. 1 Branch's Ann. P.C. 2d Ed. par. 515, page 496.

Appellant next insists that Art. 1723, supra, is unconstitutional.

It is first contended that the definition of a "bomb" in Sec. 1(a) is so vague and indefinite as to render the statute invalid. Appellant contends that the statute as written makes it unlawful for any citizen to possess any combustible substance which is controlled within a container and capable of being set off or exploded which would include the possession of certain items of property such as an ordinary kerosene lantern. Appellant insists that the statute as written imposes an unreasonable restriction upon the use and enjoyment of lawful property in violation of the "due process" clauses of both the State and Federal Constitutions, as was condemned by this court in the recent case of

Marney v. State, 330 S.W. 2d 623, in holding unconstitutional Sec. 3 of Art. 1436b, V.A.P.C. which purported to make unlawful the possession of mercury without a bill of sale or other evidence of title.

The definition of a bomb in Sec. 1(a) of the statute does not apply to possession of substances in a container when "used or intended to be used for industrial, mechanical, laboratory, or medical purposes or for use in the arts and sciences, or for use as economic poisons, antifreeze preparations, or fuels," under the exemptions contained in Sec. 9 of the statute. It would not be unlawful to possess an ordinary kerosene lantern when the combustible substance therein was "used or intended to be used" for fuel. So the statute, Art. 1723, supra, does not impose an unreasonable restriction upon the use and enjoyment of lawful property. Clearly it is within the police power of the legislature to provide that it shall be unlawful to possess a bomb. We hold Sec. 1(a) of the statute valid and constitutional.

We need not pass upon the appellant's attack upon the constitutionality of Sec. 1(c) of Art. 1723, supra, as it is not shown to have been violated. Hoffman v. State, ... Tex. Cr. R. ....., 20 S.W. 2d 1057, and Atwood v. State, 135 Tex. Cr. R. 543, 121 S.W. 2d 353.

Section 11 of Art. 1723, supra, provides in part as follows: "Should any section or part of this Act be held invalid, it shall not affect nor invalidate any other section or part hereof."

We overrule appellant's contention that Art. 1723, supra, was repealed by the subsequent enactment of Art. 1725, V.A.P.C., which regulates the possession and sale of fireworks. Nor do we agree with appellant that if Art. 1725, supra, did not repeal Art. 1723, supra, the two statutes denounce the same acts, provide different penalties, and therefore cannot be enforced for lack of certainty as to the punishment. Art. 1725 did not by its provisions expressly repeal Art. 1723, supra. Art. 1723, supra, relates to bombs

as defined therein while Art. 1725, supra; relates to fireworks. Art. 1723, supra, makes it unlawful *to possess a bomb* while Art. 1725, supra, makes it unlawful to *possess for sale* certain types of fireworks. The two statutes do not denounce the same acts and are not in pari materia. The enactment of Art. 1725, supra, did not by implication repeal Art. 1723, supra, and the two statutes can both stand and be enforced.

We overrule appellant's contention that the evidence is insufficient to sustain the conviction.

Upon the trial, the state introduced in evidence the appellant's extra judicial confession in which appellant admitted that on the date alleged he and his two companions possessed a bomb. The confession was sufficiently corroborated by other evidence introduced by the state. Furthermore, appellant while testifying as a witness in his own behalf admitted possessing the bomb. Appellant's extra judicial confession was sufficient to sustain his conviction without being corroborated. Fancher v. State, ... Tex. Cr. R. ....., 319 S.W. 2d 707.

Appellant's remaining contention is that because probation was granted to appellant's two accomplices the court erred in refusing to grant probation to appellant.

Whether an accused be granted benefit of the Adult Probation and Parole Law in this State is a matter resting within the sound discretion of the trial court. A convict has no authority to require such clemency. Baker v. State, 151 Tex. Cr. R. 454, 209 S.W. 2d 769, and Wilson v. State, 156 Tex. Cr. R. 228, 240 S.W. 2d 774. The record shows no abuse of discretion upon the part of the trial court in denying probation to appellant. The contention is overruled.

The judgment is affirmed.

Dice, *Judge*.

(Delivered June 15, 1960)

Opinion Approved by the Court.

Dissenting Opinion

The statute under which this prosecution rests is void and in contravention of the Constitution of this state and of the United States.

The statute makes unlawful the mere possession of property and merchandise which is neither contraband nor so dangerous to the public health and welfare as to authorize the legislature, under its police power, to prohibit the ownership and possession thereof. The statute therefore violates and is in contravention of Art. 1, Sec. 19, of the Constitution of this state and of the Fourteenth Amendment to the Federal Constitution.

The offense created by the statute is in no manner dependent upon some unlawful use or intended use of a can of gasoline. Rather, it prohibits and makes unlawful the ownership and possession of the gasoline in the container and therefore violates due process of law.

The statute is void and unconstitutional because the exceptions contained therein render it class legislation and therefore violative of equal protection as guaranteed by Art. 1, Sec. 3, of the Constitution of this state and the Fourteenth Amendment to the Federal Constitution.

There is an entire absence of any reasonable basis for authorizing the possession and ownership of a can of gasoline, susceptible of being exploded, by all those persons, individuals, or corporations who are exempted from the statute and at the same time making it unlawful for others not so exempted to do so. The exemptions constitute the statute class legislation.

It will be noticed that the exemptions are not limited to the possession and ownership of a can of gasoline in the conduct or operation of business or professions. The business or purpose or intent with which the can of gasoline is possessed is not material or an element of the offense.

The mere possession of the can of gasoline is lawful as to such parties but is unlawful to this applicant.

The statute is destroyed and rendered nugatory by the exemption of a can of gasoline which is used or intended to be used for industrial or mechanical purposes.

If the possession of a can of gasoline is authorized for such purposes, then what reason exists to make it unlawful for one to possess a can of gasoline for some other equally lawful and legitimate purpose? There is none. Hence the statute is void, as class legislation.

The statute is also destroyed by the exemption which takes from the provisions thereof "small arms propellent powder" and "old fashioned black powder."

There appears to be an entire absence of any reason for saying that the possession of such articles is lawful, while the possession of a can of gasoline is unlawful.

The entire statute, however, fails as a valid criminal statute by exempting "fuels" therefrom.

It is a matter of common knowledge that gasoline is a fuel, yet fuels are wholly and entirely exempted from the act. Accordingly, the construction must be given to this exemption as destroying gasoline as a substance out of which a bomb may be constructed.

Under that exemption, the can of gasoline described in the indictment could not be and was not a bomb within the definition of that term, because a bomb can not be constructed of a fuel and gasoline is a fuel.

The statute under which appellant has been convicted is null and void.

I have here limited a discussion of the question of constitutionality of the statute to general terms. At a later date I may extend my views at length, together with the citation and discussion of authorities supporting those

views. What I have here said is deemed sufficient in view of the fact that the court does not discuss the question.

I dissent.

DAVIDSON, *Judge*.

Delivered June 15, 1960.

APPENDIX C

I

[Judgment]

MINUTES OF COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS

No. 31,966

APPEAL FROM DALLAS COUNTY

JAMES EVERETT McCLANE, *Appellant*,

v.

THE STATE OF TEXAS, *Appellee*.

AFFIRMED
OPINION BY JUDGE DICE
DISSENTING OPINION BY JUDGE DAVIDSON

This cause came on to be heard on the transcript of the record of the Court below, and the same being inspected, because it is the opinion of this Court that there was no error in the judgment, it is ordered, adjudged and decreed by the Court that the judgment be in all things affirmed, and that the appellant pay all costs in this behalf expended, and that this decision be certified below for observance.

II

[Order Denying Rehearing]

Motion for Rehearing Overruled Without Written Opinion
October 12, 1960

This cause came on to be heard on Appellant's Motion for Rehearing, and the same being considered, it is ordered, adjudged, and decreed by the Court that the said motion be and the same is hereby in all things overruled.